Attacking an Erroneous Judgment by means of the Writ of Habeas Corpus.

An interesting discussion of the scope of the writ of *habeas corpus,* where it is sought to be used for the purpose of attacking an excessive or an erroneous judgment, is found in the case of *ex parte Burden,* recently decided by the Supreme Court of Mississippi, and reported in 45 Southern Reporter 1. Burden, the prisoner, had been indicted by the grand jury for "assault with intent and in the attempt, to kill and murder," and the verdict of the trial jury was,—guilty of "assault and battery with intent to commit manslaughter." The Circuit Judge, interpreting the verdict as a conviction for a felony, sentenced Burden to a term of six years in the penitentiary. He appealed to the Supreme Court, and pending the appeal, sued out a writ of *habeas corpus* before the Chancellor, alleging that the conviction was a nullity, or at most a conviction for assault and battery only, which was a misdemeanor and would entitle him to release on bail. The Supreme Court, in a carefully worded opinion by the Chief Justice, Whitfield, allowed the writ. They went on the ground that, as there was no such crime known to the laws of the State as that of which Burden was convicted, the words "with intent to commit manslaughter" must be treated as mere surplusage; that the Circuit Judge, in failing to do this and in sentencing the prisoner as for a felony, had exceeded his jurisdiction, and that the writ of *habeas corpus* will lie wherever a prisoner has been sentenced in excess of the jurisdiction of the court. They held, however, that the sentence did not render the verdict a nullity, and remanded the prisoner for a further commitment under the verdict of assault and battery.

The particular distinction which the Court drew in this case was that between a judgment erroneous in its essence, as this was, and one merely successive, as for a period of time longer than that permitted by statute. The former, they said, could be attacked in this collateral manner, the latter, only directly on appeal.

The question as to just when a court exceeds its jurisdiction in the imposition of a sentence is one on which the courts have differed decidedly. All have agreed that to sentence under a verdict which does not conform to any known law is erroneous; indeed, it was upon the authority of two earlier Mississippi

cases to that effect that *ex parte Burden* was decided.[1] But it has long been questioned whether, when the court has undoubted jurisdiction of the person of the accused, and also of the offence with which he is charged, a merely excessive sentence, one overstepping the statutory limit, will be held to have been given without jurisdiction, so that the writ of *habeas corpus* may be employed to attack it, or will be held to have been a pure error and only assailable on appeal. A number of courts have adhered to the latter view;[2] others have gone to the opposite extreme and declared the judgment void *ab initio,* and the prisoner discharged[3]—a lamentable failure of justice because of a technicality—while still others (and these seem to be in the majority) declare that only the excessive portion of the sentence is void, so that the prisoner may not be released upon *habeas corpus* until he has served out the valid period of his term.[4] "The prevailing rule is that an excessive sentence is merely erroneous and voidable; that the whole sentence is not illegal and void because of the excess; that it is not void *ab initio,* and that it is good on *habeas corpus* so far as the power of the court extends, and invalid only as to the excess."[5] The great New York case of *The People ex rel. Tweed* v. *Viscomb,* 60 N. Y., 559 (1875), in which the notorious Tweed, after having been convicted on twelve counts and sentenced separately under each, obtained his liberty after serving the term prescribed for the first, follows this rule, as does also the leading case in the United States Supreme Court, *ex parte Lange,* 18 Wallace, 163 (1873). Hence, the action of the Court in the Burden case in remanding the prisoner for a proper sentence, would seem to be sanctioned by the better authority.

It is interesting to note certain other irregularities which have been held to admit the remedy of *habeas corpus.* Where, for example, a statute provides a punishment of fine or imprisonment, and the Court sentences the prisoner to fine *and* imprisonment, he will be dischargeable under this writ as soon as he

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[1] *Gipson* v. *State,* 38 Miss., 295 (1860); *Traube* v. *State,* 56 Miss., 153 (1878).

[2] *In re Graham,* 76 Wisconsin, 366 (1890); *Sennot's Case,* 146 Mass., 489 (1888).

[3] *Ex parte Page,* 49 Mo., 291 (1872).

[4] *In re Bulger,* 60 Cal., 438 (1882); *Ex parte Cox,* 32 Pac. (Idaho), 1971 (1893); *In re Fanton,* 55 Neb., 703 (1898).

[5] Church, "The Writ of Habeas Corpus;" sec. 373 (1893).

has paid the one or the other penalty.[6] Similarly where the Court adds a penalty, of its own motion, to that prescribed by law, such as the addition of the words "at hard labor,"[7] the writ of *habeas corpus* has been allowed; and always where the record shows the verdict to have been irregularly rendered, as by eleven jurors.[8] Generally speaking, however, the courts are very jealous of this remedy, and it has even been refused in a case in which a penitentiary sentence was imposed for an offence punishable only in the county jail,[9] the Supreme Court of South Carolina declaring this a clear case for a remedy by appeal. This particular decision would seem to be a questionable one from the standpoint of jurisdiction, but it represents the extreme reluctance of many courts to permit a collateral attack upon the judgment of a trial Judge. English courts, says Mr. Church, are particularly conservative in this respect.

There was a strong dissent delivered in *ex parte Burden* by Mr. Justice MAYES, based upon the proposition that the Circuit Judge was forced to construe an ambiguous verdict, and that a sentence imposed upon his interpretation thereof, even though erroneous, could not be assailed in this manner. This position is sustained by the decision of the Supreme Court of the United States in the case of *in re,* Eckhart, 166 U. S., 481 (1896), and under the reasoning in that case would seem to be sound, if we admit the verdict to be ambiguous. But it can hardly be said that a verdict of "assault and battery with intent to commit manslaughter" is an equivocal conviction, manslaughter being the form of homicide in which the element of intent is not found.

The decision of the majority of the court appears to be sound on principle and in consonance with the authority of the most carefully considered cases, and constitutes one more step toward uniformity in the application of the principles of justice in this somewhat confused domain of the law.

EMPLOYERS' LIABILITY ACT.

This Act (34 Stat. at L. 232 chap. 3073) was declared unconstitutional by the Supreme Court of the United States in

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[6] *In re Bonner,* 151 U. S., 242 (1893); *U. S.* v. *Pridgeon,* 153 U. S., 48 (1893).

[7] *Ex parte Kelly,* 65 Cal., 154 (1884).

[8] *Scott* v. *State,* 70 Miss., 247 (1892).

[9] *Ex parte Bond,* 9 S. Car., 80 (1877).